



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURT

Misc Application 156 of 2003

OWINO OKEYO & CO. ADVOCATES.....PLAINTIFF

VERSUS

PELICAN ENGINEERING & CONSTRUCTION CO. DEFENDANT

RULING

This is an application for judgement to be entered in favour of the applicants, in terms of the certificate of taxation which was issued by the learned taxing officer. The application was made pursuant to Section 51 (2) of the Advocates Act, and also Order 50 rule 1 of the Civil Procedure Rules.

It is common ground that the applicant's Bill of Costs was taxed on 28th March 2005, in the sum of Kshs.309,895/=. There is also no dispute about the fact that the Certificate of Taxation which was issued by the taxing officer has not been varied, reviewed or set aside. For that reason, the applicant believes that they are entitled to judgment, as provided for by section 51 (2) of the Advocates Act. The said statutory provision reads as follows;

"The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the court, be final as to the amount of costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgement be entered for the sum certified to be due with costs."

The question that needs to be answered is whether the respondent has brought fourth any good reason that may persuade this court not to grant judgement as prayed. That is the only question that I need to grapple with as the certificate of taxation has not been altered or set aside. It is therefore final, as regards the costs of Kshs.309,895/=. In the circumstances, unless the respondent persuades me otherwise, I would grant judgement in favour of the applicant.

In the respondent's contention, there was no proper applicant as the firm of Owino Okeyo & Company Advocates was dissolved by the court. A copy of the judgement of the **Hon. Kuloba J., in ODONGO MARK OKEYO –VS- STEVE OMONDI OWINO HCCC NO. 637 OF 2000,** was attached to the Replying Affidavit of Mr. Mike Maina, the respondent's Managing Director.

A perusal of the said judgement reveals that the partnership between the two litigants was only existing in name, prior to 24th June 2003. This is what the court said in its judgement, at page 2;

"Having regard for the evidence, the court is satisfied that the partnership exists in name

only, but the plaintiff is, for all intents and purposes, out of it, whether by design or default. No useful purpose is being served by the continued existence of the partnership, and it is hereby dissolved."

As the applicant's advocate concedes the order of dissolution of the partnership, can the applicant be entitled to pursue this claim?

According to the applicant's advocates, his client was registered as a business name, pursuant to the Registration of Business Names Act, on 18th January 1990. That fact is clearly spelt out in the judgement of the Hon. Kuloba J. It was therefore submitted that even though the partnership had been dissolved, its registration had not yet been cancelled, as required by Section 15 of the Registration of Business Names Act. In the circumstances, the applicant contends that it remains a registered entity, which has the legal capacity to bring about these proceedings.

To that end, the applicant relies on the provisions of Section 42 of the Partnership Act (Cap. 29), which presupposes the continued existence of the firm, for winding-up purposes.

It was the applicant's contention that the process of taxation and thereafter seeking to carry out execution for the taxed costs, was an exercise in the process of winding-up the firm.

But the respondent believes that the only person who would have the legal capacity to pursue the taxed costs would be the applicant's successor in title.

Section 42 of the Partnership Act stipulates as follows;

"After the dissolution of a partnership, the authority for each partner to bind the firm, and the other rights and obligations of the partners continue notwithstanding the dissolution, so far as may be necessary to wind-up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise....."

In my understanding of that provision, the firm stands dissolved, but the law provides that the partners may continue to have authority to bind the firm. Also, the rights and obligations of the partners continue, even though the partnership itself had been dissolved. However, the existence of the authority to bind the firm, or of the partners rights and obligations only remain so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution.

In this case, the partnership was dissolved on 24th June 2003. In my understanding, no firm by the name of Owino Okeyo & Company Advocates existed after that date.

However, Mr. Odongo Mark Okeyo and Mr. Steve Omondi Owino continued to have authority to bind the firm. The two former partners also continued to have rights and obligations, for as long as it was necessary to wind up the partnership, and to complete transactions begun but unfinished at the time of the dissolution.

It is thus my considered view that after dissolution of the firm, no proceedings could be sustained by the said firm. If the court were to hold otherwise, it would make a mockery of the judgement by the Hon. Kuloba J.

However, the applicant contends that it still has life, by virtue of the certificate of registration issued under the Registration of Business Names Act.

To my mind, the Registration of Business Names Act is not superior to the Partnership Act. Therefore, if the firm was dissolved pursuant to the provisions of the Partnership Act, it could not be deemed to nonetheless have continued to exist, simply because it had been registered under the

Registration of Business Names Act.

Indeed, it must be appreciated that for an individual or more persons to possess the ability to have himself (or themselves) registered, he (or they) must first be in existence.

In this case, the two former partners first came together, as partners and then coined a name. It is thereafter that they sought to be registered, as a business.

Thereafter, when the court ordered the firm to be dissolved, its existence came to an end, save as expressly provided for by statute.

Perhaps it might be easier to understand the situation if the analogy of a natural person was used. A person is normally born by his/her mother. Thereafter, the birth of the child is registered by the state. However, it is not the said registration which gives birth to the child.

Similarly, when a person dies, the state requires his next of kin to register the fact of death. But regardless of the delay, such as there might be, in registering the death, the person remains dead.

So also with a partnership. It comes to life by legal recognition, through the act of two or more persons getting together. And the law recognises the fact that when there is a falling out of the partners, the partnership would stand dissolved, even if it's said dissolution had not been, formally, declared by a court of law. I believe that that is why, in his considered judgement, in **Odongo Mark Okeyo –vs- Steve Omondi Owino** (supra), the Hon. Kuloba J. noted that the partnership existed in name only. In other words, the partnership did not exist, in real terms, even before it was dissolved. The firm had died before the court formally declared it so.

And, if the partnership did not exist, it could not institute or sustain any proceedings. Therefore, I hold the considered view that the respondent is right to have put forward the objection, as it did.

Section 15 (1) of the Registration of Business Names Act does not, in my considered view imply that just because the registration of a business name had not been cancelled, the business still existed. If anything, the law requires the person who had registered a business name, but who thereafter had ceased to carry on business, to notify the Registrar that he had ceased to carry on business. The notification to the Registrar is required to be delivered within three months after the business ceased to be carried on.

As the law placed the obligation on the former partners of the applicant to give notice to the Registrar, within a specified time-frame, the said former partners cannot seek to benefit from their failure to comply with the law. But, in any event, even though the said notification to the Registrar had not been given, the partnership remains dissolved. Therefore, the dissolved firm could not sustain these proceedings.

However, I also hold the considered view that the respondent erred by raising these fundamental legal issues only after the applicant had, not only gone through the process of taxation, but had also argued its case for judgement. Strictly speaking, the issue as to the legal ability of the applicant should have been raised as a preliminary issue, at the time when the applicant sought to tax its Bill of Costs. The respondent should not have willingly participated in the taxation of a Bill of Costs of a person who it now says did not exist.

For those reasons, the application dated 30th June 2005 is struck out. However, each party is to bear its own costs.

Dated and Delivered at Nairobi this 24th day of January 2006

FRED

A.

OCHIENG

JUDGE

